

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 189

Docket No. NY-844E-09-0134-X-1

**Wilfredo Mercado,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

September 15, 2010

David Lugo Mariani, Esquire, Guaynabo, Puerto Rico, for the appellant.

Charlretta T. McNeill, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board on a Recommendation finding noncompliance with a final Board decision ordering the Office of Personnel Management (OPM) to grant the appellant's application for disability retirement. *Mercado v. Office of Personnel Management*, MSPB Docket No. NY-844E-09-0134-C-1 (Dec. 31, 2009) Compliance File (CF), Tab 9 (Recommendation). For the reasons set forth below, we find the agency in compliance and DISMISS the appellant's petition for enforcement.

BACKGROUND

¶2 On June 5, 2009, the administrative judge assigned to the case reversed OPM's reconsideration decision denying the appellant's application for disability retirement under the Federal Employees' Retirement System and ordered OPM to grant the appellant's application and complete its action within twenty days after the initial decision became final. *Mercado v. Office of Personnel Management*, MSPB Docket No. NY-844E-09-0134-I-1, Initial Appeal File (IAF), Tab 13. The appellant subsequently filed a petition for enforcement, contending that OPM had failed to implement the MSPB's order. CF, Tab 1. Following issuance of two orders directing OPM to produce evidence of compliance, OPM responded that it had made interim payments to the appellant, but the appellant contended that he had not received the full retroactive payment to which he was entitled. CF, Tabs 7 and 8.

¶3 The administrative judge found that OPM had failed to explain why its interim payment to the appellant commenced November 1, 2008, rather than September 29, 2007, the appellant's last day in pay status. CF, Tab 9. The administrative judge stated that to be in compliance, OPM must: (1) compute the amount of the retroactive payment to which the appellant is entitled; (2) provide him with the amount still owed; (3) provide a written explanation of its calculations; and (4) determine the amount of the current monthly annuity payment to which the appellant is entitled. *Id.* at 3.

ANALYSIS

¶4 It is the agency's burden to establish compliance with a final Board order. *Spates v. U.S. Postal Service*, [70 M.S.P.R. 438](#), 441 (1996). Where the agency offers relevant, material, and credible evidence of compliance, the appellant must offer evidence in rebuttal. *Id.* at 443.

¶5 Here, OPM has provided a computer printout showing that it has computed the amount of the appellant's retroactive annuity payment and paid the appellant

that amount. *Mercado v. Office of Personnel Management*, MSPB Docket No. NY-844E-09-0134-X-1, Compliance Referral File (CRF), Tab 5. OPM's computer printout and explanation show that: (1) OPM authorized an interim payment of \$14,731.20 on October 13, 2009, for the period November 1, 2008, through September 30, 2009, and reissued the payment on October 23, 2009, because, according to OPM's representative, the first payment was returned due to a "closed account;" (2) OPM authorized a second interim payment of \$1,664.56 on October 13, 2009, for the period October 1, 2009, through October 30, 2009; (3) OPM authorized a third interim payment of \$1,674.00 on November 21, 2009, for the period December 1, 2009, through December 30, 2009; and (4) OPM authorized a final retroactive payment of \$11,672.06 on February 26, 2010, for the period September 21, 2007, the appellant's last day in pay status, "through February 30, 2010."¹ CRF, Tab 5. Finally, OPM stated that the appellant's regular monthly annuity, beginning April 1, 2010, is \$1,221.04 and references page 3 of its printout which lists a payment of \$1,221.04 for the period March 1, 2010, through March 31, 2010. *Id.* Page 2 of the same printout, however, shows a payment of \$1,227.27 for the period of March 1, 2010, through March 30, 2010. *Id.* Further, the appellant's March 29, 2010, submission contains a benefits statement indicating that the appellant's monthly annuity will be \$1,227.27.² CRF, Tabs 4. To the extent there is a question as to the correct monthly annuity benefit, the appellant, as discussed *infra* at ¶ 7, should present the issue to OPM in the first instance.

¶6 Indeed, OPM asserts that the administrative judge's earlier finding of noncompliance was erroneous as the Board's final order merely directed OPM to

¹ OPM's reference to "February 30, 2010," is inaccurate, as February 28th is the last day of February in 2010.

² The benefits statement appears to be a document sent to the appellant by OPM and contains a statement of net monthly benefits on a page marked 5 of 28. CRF, Tab 4.

approve the appellant's application for disability retirement benefits. CRF, Tab 5. OPM, citing to *Parkin v. Office of Personnel Management*, [103 M.S.P.R. 468](#) (2006), contends that its payment of interim benefits shows that it was in compliance at the time the Recommendation was issued.

¶7 The appellant does not contest the fact of payment, but rather, in a submission filed prior to OPM's submission of the payment printout, argues that OPM incorrectly calculated his "high 3" average salary and attaches some pay statements to support his claim. CRF, Tab 4. Consistent with the rationale of *Parkin*, the Board will not consider the calculation issue in the first instance. *Parkin* concerned a petition for enforcement of a Board decision dismissing an appeal as moot following OPM's rescission of its denial of an appellant's application for disability retirement during the processing of the appellant's appeal challenging that denial. *Parkin*, [103 M.S.P.R. 468](#), ¶¶ 2-3. While the Board in *Parkin* held that a Board decision dismissing an appeal as moot is not an enforceable decision, it stated further that, even if there were an enforceable decision on the merits, the Board would lack jurisdiction to consider the appellant's challenge to OPM's calculations because the appellant had not raised the issue to OPM in the first instance and OPM had not issued a final decision on the calculation issue. *Parkin*, [103 M.S.P.R. 468](#), ¶ 9. As the appellant here has not raised a challenge to OPM's calculation of his annuity with OPM in the first instance, we will not consider his challenge now.³

¶8 The appellant also argues that sanctions should be imposed against OPM for its dilatory responses. The Board's ability to award sanctions is a means to enforce compliance. CRF, Tab 2 and 4. Because compliance has been demonstrated, it would be inappropriate to impose sanctions. *Camastro v.*

³ In the event that the appellant wishes to challenge OPM's calculations, he may request a decision from OPM on this issue. If he is dissatisfied with OPM's final decision, he may file an appeal of OPM's decision with the Board. See [5 C.F.R. § 841.308](#).

Department of Justice, [86 M.S.P.R. 267](#), ¶ 18 (2000). Accordingly, having found compliance, we DISMISS the appellant's petition for enforcement.⁴

ORDER

¶9 This is the final decision of the Merit Systems Protection Board in this enforcement proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b) ([5 C.F.R. § 1201.183\(b\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

⁴ The appellant's request for attorney fees, CRF, Tab 4, should be filed with the New York Field Office and should be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.